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No. 96-469

In the Supreme Court of the United States

OCTOBER TERM, 1996

ELECTRO-VOICE, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the Regional Director of the National Labor Relations Board (Board) was entitled to interim injunctive relief, pursuant to Section 10(j) of the National Labor Relations Act, 29 U.S.C. 160(j), pending the Board's disposition of an administrative complaint against petitioner.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-32a) is reported at 83 F.3d 1559. The opinion of the district court (Pet. App. 39a-74a) is reported at 149 L.R.R.M. (BNA) 2476. The subsequent decision and order of the district court dismissing this action as moot (App., *infra*, 1a-4a) are unreported.

JURISDICTION

The judgment of the court of appeals (Pet. App. 33a) was entered on April 26, 1996. On July 18, 1996, Justice Stevens extended the time for filing a petition for a writ of certiorari to and including September 23, 1996 (Pet. App. 75a), and the petition was filed on that

date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner manufactures fiberglass stadium horns, electronic cross-over panels, and cables for military headsets at a plant in Mishawaka, Indiana. Pet. App. 2a. In early 1994, employees working at the Indiana plant began to raise various work-related concerns with management. *Id.* at 3a. In January or February, employee Pam Buford informed petitioner's human resources manager, Minnie Warren, that employees were dissatisfied with plant manager Dennis Northam and with working conditions in the plant. Buford requested a meeting with Warren to discuss these matters. *Ibid.* Two weeks later, Northam and another management official met with the employees and informed them that no changes would be made. *Ibid.* Employees also approached a supervisor about obtaining additional exhaust fans to alleviate excessive heat and air pollution in the plant; their request was also denied. *Id.* at 3a-4a.

In May 1994, having received no action from management on her complaints, Buford met with her co-workers to discuss forming a union. In June, she contacted a representative of the International Union of Electronic, Electrical, Salaried, Machine and Furniture Workers, AFL-CIO (Union). Pet. App. 2a, 4a. A Union meeting was held on June 22, 1994. At that meeting, 21 of the 30 plant employees signed union authorization cards, and 11 employees volunteered to serve on an organizing committee. *Id.* at 5a, 24a. On July 7, 1994, the Union requested that petitioner voluntarily recognize it as the employees' collective-bargaining representative. The Union also filed a

representation petition with the National Labor Relations Board (Board). *Id.* at 8a, 45a.

The same day, after receiving the Union's request for recognition, Ronald Graham, petitioner's vice-president of human resources, ordered the termination of any employee who had accumulated more than seven absentee "points," or who had been employed by petitioner for less than six months and had accumulated "a good number of points." Pet. App. 8a. The new rules represented a sudden departure from the company's existing written attendance policy. *Ibid.* Pursuant to Graham's directive, nine employees were immediately fired and replaced by personnel supplied by a temporary employment service. Each of the nine dischargees had signed a Union authorization card and five of the nine had volunteered to work on the organizing committee. *Id.* at 9a.

On July 8, 1994, the day after the discharges, the Union held a meeting, which was attended by only one or two employees. Pet. App. 9a. Petitioner subsequently remedied various complaints that the employees had earlier voiced about their working conditions, including providing them with requested fans and tools, and adding seats in the break room. *Id.* at 9a-10a. The Union held no further meetings with employees after July 8. *Id.* at 10a.

2. a. On October 18, 1994, acting on unfair labor practice charges filed by the Union, the Board's Regional Director issued an administrative complaint against petitioner. The administrative complaint alleged that petitioner violated Section 8(a)(1), (3), and (5) of the National Labor Relations Act (Act), 29 U.S.C. 158(a)(1), (3), and (5), by, among other things, discharging employees in retaliation for supporting the Union, threatening employees with plant closure

if they chose Union representation, and unlawfully soliciting and remedying employee grievances in order to thwart union efforts. Pet. App. 10a. On December 19, 1994, a hearing on the administrative complaint commenced before an administrative law judge. The next day, December 20, 1994, the Regional Director filed a petition in federal district court, seeking interim injunctive relief against petitioner pursuant to Section 10(j) of the Act, 29 U.S.C. 160(j).[1] Pet. App. 10a. The Regional Director requested, *inter alia*, that the district court order petitioner to bargain with the Union on an interim basis pursuant to *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969),[2]

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[1] Section 10(j) provides in relevant part:

> The Board shall have power, upon issuance of a complaint * * * charging that any person has engaged in or is engaging in an unfair labor practice, to petition any United States district court, within any district wherein the unfair labor practice in question is alleged to have occurred * * *, for appropriate temporary relief or restraining order. Upon the filing of any such petition the court * * * shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.

29 U.S.C. 160(j).

[2] Under *Gissel*, the Board may order an employer to bargain with a union, rather than conduct an election, where employee authorization cards establish that the union at one time enjoyed majority support in the bargaining unit, and the Board finds that "the possibility of erasing the effects of past [unfair labor] practices and of ensuring a fair election * * * by the use of traditional remedies, though present, is slight and that employee sentiment once expressed through cards would, on balance, be better protected by a bargaining order." 395 U.S. at 614-615.

pending the Board's adjudication of the unfair labor practice complaint. Pet. App. 67a-68a, 70a.

b. On May 5, 1995, the district court denied the Regional Director's petition for Section 10(j) relief. Pet. App. 38a. The court explained that, in ruling on a Section 10(j) petition, it "must determine solely whether a preliminary injunction * * * is 'just and proper,'" and that, "[t]o determine whether an injunction would be 'just and proper,' this court must apply the traditional test in equity." *Id.* at 50a (internal quotation marks omitted). The court further stated that, "[u]nder the traditional test, * * * the [Regional] Director must show: (1) a reasonable likelihood of success on the merits; (2) an inadequacy of a remedy at law or threat of irreparable harm if an injunction is not issued; (3) the balance of the threatened harms if an injunction is issued against the threatened harms if an injunction is not issued; and (4) that the preliminary injunction would serve the public interest." *Ibid.* Applying those principles, the court declined to issue an interim injunction. *Id.* at 51a-73a.[3] The Board filed a notice of appeal from the judgment of the district court on July 3, 1995. *Id.* at 35a.

3. On March 29, 1996, while the Board's appeal in the Section 10(j) case was pending before the court of appeals, the Board issued a decision and order in the

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[3] The district court did not conduct an evidentiary hearing with respect to the petition. Instead, it relied on the transcript of the hearing before the administrative law judge, supplemented by additional evidentiary material. Pet. App. 10a-11a. Based on those materials, the court concluded that the Regional Director had not demonstrated a likelihood of success on the merits, and had not met the other requirements of the traditional equitable test for injunctive relief. *Id.* at 66a, 72a, 73a.

underlying unfair labor practice proceeding. *Electro-Voice, Inc.*, 320 N.L.R.B. No. 134 (Mar. 29, 1996). The Board sustained the allegations of the Regional Director's administrative complaint, finding that petitioner, in violation of Section 8(a)(1), (3), and (5) of the Act, had (among other things) unlawfully fired employees, threatened employees with plant closure, solicited and remedied employee grievances, coercively interrogated employees, and unilaterally changed its absenteeism policy. Slip op. 1-4, 16-19. The Board found that petitioner's "well-orchestrated, intensive" conduct had "effectively killed off the Union's organizational campaign and proclaimed to the employees that self-organization would not be tolerated." *Id.* at 4. Concluding that the possibility of holding a fair election was unlikely in light of the "egregious" nature of petitioner's misconduct, the Board, *inter alia*, issued a *Gissel* bargaining order. *Id.* at 3-4 & n.7.

On April 16, 1996, petitioner filed with the Board a motion for reconsideration and to reopen the administrative record for the purpose of receiving additional evidence bearing on the propriety of the *Gissel* order. On April 19, petitioner filed a supplemental motion. See *Electro-Voice, Inc.*, 321 N.L.R.B. No. 63 (June 5, 1996), slip op. 1.

4. On April 26, 1996, while the above-noted motions were pending before the Board, the court of appeals reversed the district court's denial of the Regional Director's petition for Section 10(j) relief. The court of appeals remanded the case to the district court for the entry of an injunction against petitioner, including an interim *Gissel* bargaining order. Pet. App. 1a-32a.

The court of appeals agreed with the district court that, in determining whether the Regional Director is entitled to Section 10(j) relief, courts "should 'evaluate the propriety of the Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry.'" Pet. App. 12a (quoting *Kinney* v. *Pioneer Press*, 881 F.2d 485, 490 (7th Cir. 1989)). The court of appeals concluded that the district court had erred, however, in determining the Regional Director's burden of proof with respect to those criteria. *Id.* at 14a. The court explained that, in order to obtain interim injunctive relief under Section 10(j), the Regional Director must establish: (1) that there is no adequate remedy at law, *i.e.*, "that an award of damages would be seriously deficient"; (2) that public harm would result absent the injunction; (3) that the "labor effort" would be irreparably harmed absent the injunction, and that that harm would outweigh any irreparable harm to the employer; and (4) that the Regional Director has "some likelihood of succeeding on the merits." *Id.* at 14a-15a (internal quotation marks omitted). The court further explained that "some likelihood of succeeding on the merits" means "a better than negligible chance" of success. *Id.* at 15a, 17a (internal quotation marks omitted).

The court stated that the Regional Director "must satisfy the first two requirements by a preponderance of the evidence" and "must also show irreparable harm by a preponderance of the evidence." Pet. App. 14a-15a. The court further explained, however, that a "sliding scale" analysis applies "between the likelihood of success and the balancing of the harms"; the Regional Director "need not demonstrate that the harm to the labor effort outweighs the harm to the

employer if the Director makes a strong showing under the fourth requirement. * * * In other words, a strong showing by the Director of likely success on the merits can offset a weak showing of harm." *Id.* at 15a.

Applying the above principles, the court concluded that the Regional Director was entitled to Section 10(j) relief in this case. Pet. App. 15a-31a. It found that the Regional Director had established a sufficient likelihood of success on the merits of the unfair labor practice complaint (*id.* at 17a, 23a, 25a); that she had made "a sufficient demonstration of irreparable harm to the collective bargaining process" for which there was no adequate remedy at law, and that petitioner had "offered no countervailing demonstration of irreparable harm that would result from a grant of injunctive relief" (*id.* at 27a); and that "[t]here is no evidence that public harm would result from injunctive relief" (*id.* at 28a). The court therefore remanded the case to the district court for the entry of an interim injunction against petitioner. *Id.* at 32a.

5. On June 5, 1996, the Board issued an order denying petitioner's pending motions in the unfair labor practice proceeding. *Electro-Voice, Inc.*, 321 N.L.R.B. No. 63 (June 5, 1996). In light of the Board's issuance of a final order in the administrative proceeding, the Regional Director, on July 17, 1996, filed a motion with the district court, seeking voluntary dismissal of her Section 10(j) petition on the ground of mootness.[4] On July 23, 1996, the district court

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[4] After the Board issued its initial decision and order, the Regional Director had filed with the court of appeals a motion to dismiss her appeal as moot. Pet. App. 34a-37a. After petitioner filed its motions for reconsideration and to reopen the

entered a judgment granting the Regional Director's motion and dismissed the Section 10(j) action. App., *infra*, 1a-2a. In an accompanying memorandum, the district judge stated that "final adjudication has occurred before the National Labor Relations Board," and that "the [Regional Director's] action under Section 10(j) * * * is therefore moot." *Id.* at 3a-4a. Petitioner did not appeal the district court's dismissal order, and no injunction was ever issued against petitioner.[5]

ARGUMENT

Petitioner seeks review of the court of appeals' decision that interim relief under Section 10(j) was warranted in this case. Because the Board's subsequent resolution of the underlying unfair labor practice charges against petitioner resulted in the termination of any interim relief, this case is now moot. Moreover, because the decision below would not otherwise warrant this Court's review, the petition should be denied.

1. Section 10(j) of the Act "authorizes the NLRB to seek, and the United States district courts to grant, interim relief pending the NLRB's resolution of unfair labor practices." *Rivera-Vega* v. *Conagra, Inc.*, 70 F.3d 153, 158 (1st Cir. 1995). Thus, "a § 10(j) injunction exists only so long as the charges are pending" before the Board; and any "temporary

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administrative record with the Board, however, the Regional Director requested, and the court of appeals granted, leave to withdraw the Regional Director's motion. *Id.* at 76a.

[5] The company has filed a petition for review of the Board's order in the underlying unfair labor practice case. That proceeding is now pending in the court of appeals. See Pet. App. 77a-78a.

relief" granted the Regional Director pursuant to Section 10(j) "expire[s]" once "the Board has issued its final order" in the underlying administrative proceeding. *Miller* v. *California Pacific Medical Center*, 19 F.3d 449, 453, 461 (9th Cir. 1994) (en banc). Thus, as a general rule, "resolution of a § 10(j) injunction proceeding is rendered moot by the NLRB's decision on the merits of an unfair labor practice complaint." *Id.* at 453; accord *Barbour* v. *Central Cartage, Inc.*, 583 F.2d 335, 336-337 (7th Cir. 1978). Cf. *Sears, Roebuck & Co.* v. *Carpet Layers, Local Union No. 419*, 397 U.S. 655 (1970) (per curiam) (injunction proceedings under Section 10(*l*) of the Act, 29 U.S.C. 160(*l*)).[6] Accordingly, this case became moot on June 5, 1996, when the Board denied petitioner's motions for reconsideration of its March 29, 1996 unfair labor

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[6] Section 10(*l*) of the Act requires the Board, upon finding "reasonable cause" to believe that a labor organization has engaged in a secondary boycott, or certain other proscribed activity, to petition a federal district court for temporary injunctive relief. Like Section 10(j), Section 10(*l*) empowers the court "to grant such injunctive relief or temporary restraining order as it deems just and proper, notwithstanding any other provision of law." 29 U.S.C. 160(*l*). In *Sears*, the Court held that the question whether the court of appeals had erred in holding that Sears lacked standing to appeal from the district court's denial of the Regional Director's Section 10(*l*) petition for an interim injunction against the union was rendered moot by the Board's final order in the underlying administrative proceeding. 397 U.S. at 657. The Court explained that, "even if the Court of Appeals was wrong in dismissing Sears' appeal, any relief that that court might have given would now have terminated," because "any injunction issued pursuant to that section terminates when the Board resolves the underlying dispute." *Id.* at 657-659.

practice decision. In recognition of that fact, the district court, on July 23, 1996, granted the Board's motion to dismiss the Section 10(j) proceeding as moot, rather than entering the interim injunction directed by the court of appeals. App., *infra*, 1a-4a.

Petitioner concedes (Pet. 17) that, "[b]ecause the N.L.R.B. has reached final adjudication, the underlying injunction is no longer of any purpose." Petitioner suggests (*ibid.*), however, that this Section 10(j) case is nonetheless not moot because it is one "capable of repetition, yet evading review." Petitioner lacks a jurisdictional basis for raising that contention, and, in any event, the contention lacks merit. On remand from the court of appeals, the district court dismissed this case as moot in light of the Board's intervening final decision in the underlying unfair labor practice proceeding. App., *infra*, 1a-4a. Petitioner did not appeal the district court's judgment of dismissal. Having elected not to file an appeal in the court below, petitioner lacks a jurisdictional basis for seeking review of the district court's mootness ruling in this Court.[7] The petition for certiorari should be denied on that ground alone.

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[7] If petitioner had appealed the district court's mootness ruling to the court of appeals, it could have petitioned this Court for review before judgment was rendered by the court of appeals. See 28 U.S.C. 2101(e) (authorizing application for a writ of certiorari to review a case before judgment has been rendered in the court of appeals); Sup. Ct. R. 11 (review before judgment has been entered by court of appeals "will be granted only upon a showing that the case is of such imperative public importance as to justify deviation from normal appellate practice and to require immediate determination in this Court"). As the Court has explained, the chief requisite for the exercise of its power to review a case before judgment by the court of appeals is that there be a case pending in the court of appeals,

In any event, contrary to petitioner's contention (Pet. 17), this case does not fall within the narrow exception to the mootness doctrine for disputes that are "capable of repetition, yet evading review." See, *e.g.*, *Nebraska Press Ass'n* v. *Stuart*, 427 U.S. 539, 546-547 (1976). As this Court has explained:

> [I]n the absence of a class action, the "capable of repetition, yet evading review" doctrine [is] limited to the situation where two elements combine[]: (1) the challenged action was in its duration too short to be fully litigated prior to its cessation or expiration, and (2) there [is] a reasonable expectation that the same complaining party would be subjected to the same action again.

Weinstein v. *Bradford*, 423 U.S. 147, 149 (1975) (per curiam). Accord *Murphy* v. *Hunt*, 455 U.S. 478, 482 (1982) (per curiam). This case does not meet the second element of the test; there is no "reasonable expectation" that, in the future, the Regional Director will issue an unfair labor practice complaint against petitioner, and that the violations alleged in that (putative) complaint will be of sufficient severity to cause the Regional Director to elect to seek Section 10(j) relief against petitioner in federal court. To the contrary, it should be presumed that petitioner will henceforth conduct its labor-relations affairs in a lawful manner. Cf. Pet. App. 70a (apart from the events that gave rise to this case, petitioner

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i.e., that a notice of appeal has been filed and that the case is properly docketed in the court of appeals. *Gay* v. *Ruff*, 292 U.S. 25, 30 (1934). Here, petitioner has failed to file a notice of appeal from the district court's dismissal order, which was entered on July 23, 1996 (see App., *infra*, 2a), and such an appeal would now be out-of-time. See Fed. R. App. P. 4(a)(1).

has enjoyed "a history of amicable relations with unions"); *id.* at 18a, 61a.[8]

As we demonstrate below, the court of appeals' decision in this case would not warrant the exercise of this Court's power of discretionary review in the absence of a suggestion of mootness. Because the Court would not otherwise grant review in this case, it is neither necessary nor appropriate for the Court to disturb the judgment of the court of appeals merely because the controversy has subsequently become moot. Accordingly, the petition should be denied. See *Dove* v. *United States*, 423 U.S. 325 (1976) (per curiam).[9]

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[8] *Miller* v. *California Pacific Medical Center*, *supra*, cited by petitioner (Pet. 17), is inapposite. There, the district court granted a Section 10(j) injunction against the employer, a panel of the court of appeals reversed, the court then granted the Board's petition for rehearing *en banc*, and the Board subsequently issued its final order. 19 F.3d at 451, 452-453. The court found that the case was not moot because the employer was "still in the process" of the corporate restructuring that had given rise to the then-concluded unfair labor practice proceeding before the Board. As a result, there was "a reasonable expectation that another labor dispute will arise and the Board may again seek § 10(j) relief" against the employer. *Id.* at 454. No analogous circumstances obtain here.

[9] Because the decision whether to grant review on any issue (including mootness) is discretionary with this Court, Sup. Ct. R. 10, we consistently have argued that the Court should deny review of cases that have become moot after the court of appeals entered its judgment but before this Court has acted on the petition for a writ of certiorari, when such cases do not present any question that would independently be worthy of this Court's review. See, *e.g.*, U.S. Br. in Opp. at 5-8, *Velsicol Chemical Corp.* v. *United States*, cert. denied, 435 U.S. 942 (1978) (No. 77-900) (arguing that Court should deny certiorari in moot cases that would not have warranted review on the

2. Petitioner's principal contention (Pet. 8, 9-13) is that the court of appeals' decision conflicts with those of other circuits insofar as it ordered the granting of an injunction under Section 10(j) without a showing of "reasonable cause" to believe that petitioner had violated the Act. Although there is disagreement among the courts of appeals as to the appropriate legal analysis governing the issuance of Section 10(j) injunctions, that disagreement would not warrant this Court's review of the judgment of the court of appeals in this case.

The courts of appeals have adopted different approaches in determining whether the Regional Director is entitled to a Section 10(j) injunction in a given case. Most of the circuits follow a two-step inquiry, determining, first, whether the Regional Director has demonstrated "reasonable cause" to believe that the party against whom relief is sought has violated the Act, and, second, whether the Regional Director has shown that an injunction would be "just and

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merits); Robert L. Stern, et al., *Supreme Court Practice* § 18.5, at 724 n.29 (7th ed. 1993) (discussing *Velsicol* doctrine and stating that the Court appears to follow the practice urged in the government's brief in that case); but see 13A Charles Alan Wright, et al., *Federal Practice and Procedure* § 3533.10, at 432-435 (2d ed. 1984 & Supp. 1996) (disapproving *Velsicol* doctrine and stating that vacatur under *United States* v. *Munsingwear*, 340 U.S. 36 (1950), is always appropriate when case becomes moot before Court grants certiorari). Denial of certiorari is especially appropriate in this case, because the petition neither requests, nor suggests the possibility of, vacatur under *Munsingwear* and, indeed, petitioner would lack a jurisdictional basis for doing so (see p. 11, *supra*). We have provided petitioner a copy of the United States' brief in opposition in *Velsicol*.

proper" in the circumstances. See, *e.g.*, *Conagra*, 70 F.3d at 158; *Silverman* v. *Major League Baseball Player Relations Committee, Inc.*, 67 F.3d 1054, 1059 (2d Cir. 1995); *Kobell* v. *Suburban Lines, Inc.*, 731 F.2d 1076, 1078 (3d Cir. 1984); *Frye* v. *Specialty Envelope, Inc.*, 10 F.3d 1221, 1224-1225 (6th Cir. 1993); *Arlook* v. *S. Lichtenberg & Co.*, 952 F.2d 367, 371-372 (11th Cir. 1992); *Boire* v. *Pilot Freight Carriers, Inc.*, 515 F.2d 1185, 1188-1189 (5th Cir. 1975), cert. denied, 426 U.S. 934 (1976).[10]

In *Kinney* v. *Pioneer Press*, 881 F.2d 485 (1989), the Seventh Circuit adopted a different analytical approach. There, it concluded that "reasonable cause" is not a relevant consideration in Section 10(j) cases; rather, "[o]nce the Board seeks injunctive relief under § 10(j), the only question for the court is whether the Board has demonstrated that relief is 'just and proper.'" 881 F.2d at 493. In determining whether an injunction is "just and proper," the courts must "evaluate the propriety of the [Regional] Director's request with an eye toward the traditional equitable principles that normally guide such an inquiry." *Id.* at 490.[11] The court of appeals in this case followed

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[10] The courts that follow this two-step framework differ with respect to the standard that they apply in determining whether an injunction is "just and proper": some hold that traditional equitable principles apply in determining the propriety of a Section 10(j) injunction, see *Conagra*, 70 F.3d at 164; *Kaynard* v. *Mego Corp.*, 633 F.2d 1026, 1033 (2d Cir. 1980), while others hold that those principles are inapplicable, see *Fleischut* v. *Nixon Detroit Diesel, Inc.*, 859 F.2d 26, 30 & n.3 (6th Cir. 1988); *Suburban Lines*, 731 F.2d at 1078, 1091-1092.

[11] In excluding the "reasonable cause" inquiry from the Section 10(j) analytical framework, the court in *Pioneer Press* noted that "[t]he words 'reasonable cause' appear in § 10(*l*) but

Pioneer Press in ruling that a Section 10(j) injunction should issue. See Pet. App. 12a-13a & n.16. The Ninth Circuit has followed the Seventh Circuit's approach. See *Miller*, 19 F.3d at 456-460.

As the court noted in *Pioneer Press*, the "reasonable cause" inquiry parallels aspects of the "just and proper" inquiry and, therefore, does not meaningfully add to the Section 10(j) analysis:

> When courts apply traditional equitable principles to inquire whether an injunction is "just and proper" under § 10(j), no further purpose is served by asking the district judge, as a preliminary matter, to determine whether the [Regional] Director has established reasonable cause. * * * If the General Counsel's legal theory is inapt or if the facts are stacked against the agency's position (i.e., if there is truly no reasonable cause to believe someone has breached the NLRA), it's a safe bet that injunctive relief is not "just and proper" * * * because an injunction may not issue unless

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not § 10(j)" of the Act, 881 F.2d at 489, and that the two provisions have different structures:

> The Board may invoke § 10(j) at its discretion whenever it believes someone has transgressed the NLRA, but may do so only after the General Counsel has filed an administrative complaint. Section 10(*l*), by contrast, is mandatory. It requires the Board to seek injunctive relief if an investigation yields "reasonable cause" to believe that secondary boycotts or other identified kinds of especially grave violations are in progress. * * *
>
> "Reasonable cause" is the trigger of the Board's duty under § 10(*l*).

Id. at 489-490. See also note 6, *supra*.

> the plaintiff has at least a modest chance of success on the merits.

881 F.2d at 491.[12]

Accordingly, there is no merit to petitioner's contention (Pet. 13) that, "[h]aving eliminated the 'reasonable cause' threshold, there is now no check upon the N.L.R.B. in the Seventh Circuit requiring it to show that it has sufficiently investigated a matter before initiating a Section 10(j) proceeding." Indeed, petitioner concedes (Pet. 14) that the Seventh Circuit acted properly in applying traditional equitable principles to determine whether the Regional Director's request for injunctive relief was "just and proper"; it faults the court only for not preliminarily engaging in the "reasonable cause" inquiry. See Pet. 9. As the Seventh Circuit noted in *Pioneer Press*, however, when traditional equitable principles are used in making the "just and proper" determination, a "reasonable cause" inquiry would simply be redundant. 881 F.2d at 491.[13]

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[12] Similarly, the First Circuit, which applies traditional equitable principles in its "just and proper" analysis but continues to make an initial "reasonable cause" inquiry, has stated: "We find no fault in our sister circuits' rulings" omitting the latter inquiry. *Pye* v. *Sullivan Bros. Printers, Inc.*, 38 F.3d 58, 64 n.7 (1994).

[13] In 1967, the Court granted the Board's petition for a writ of certiorari in a case presenting the question whether traditional equitable principles are applicable in Section 10(j) injunction proceedings. The Court did not decide the issue in that case, however. See *McLeod* v. *General Elec. Co.*, 385 U.S. 533 (1967) (per curiam) (vacating court of appeals' judgment and remanding for further consideration in light of subsequent execution of collective-bargaining agreement). In this case, the

Nor did the court of appeals' exclusion of the "reasonable cause" inquiry affect the outcome in this case. "Reasonable cause" places a "relatively insubstantial" burden on the Board; to satisfy it, the Regional Director need only produce "some evidence" of a violation, and articulate a theory of liability that is "not frivolous." *Frye*, 10 F.3d at 1225; accord *Kobell*, 731 F.2d at 1084. Here, in the course of determining that an injunction was "just and proper" under traditional equitable principles, the court held that the Regional Director had demonstrated a likelihood of success on the merits of the unfair labor practice complaint and that the Regional Director's theories of liability rested on settled legal principles. See Pet. App. 17a; *id.* at 15a-25a. Those findings clearly establish that, had it engaged in the inquiry, the court would also have concluded that the Regional Director had demonstrated "reasonable cause" to believe that petitioner had committed the unfair labor practices alleged in the administrative complaint.

3. Petitioner also contends (Pet. 15) that the court of appeals erred in permitting the Regional Director to establish a "likelihood of success on the merits" by demonstrating a "better than negligible" chance of success. The court explained (Pet. App. 17a), however, that a "better than negligible chance" of success on the merits means "some likelihood" of success, and it went on to state that, "[o]nce the Director establishes some likelihood of success, 'the court must then determine how likely that success is, because this affects the balance of relative harms. * * * The more likely the plaintiff is to win, the less heavily

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Board did not contest the Seventh Circuit's analytical framework in the courts below.

need the balance of harms weigh in his favor.'" *Id.* at 15a (quoting *Roland Machinery Co.* v. *Dresser Indus., Inc.*, 749 F.2d 380, 387 (7th Cir. 1984)). The court correctly applied those principles in concluding that the Regional Director "presented a case sufficient to justify injunctive relief and an interim bargaining order." Pet. App. 32a.

Petitioner is mistaken in suggesting (Pet. 15-16) that the decision below conflicts with the decisions of other courts of appeals. For example, petitioner's reliance on *Miller* v. *California Pacific Medical Center*, *supra*, is misplaced. There, the court adopted a rule quite similar to the one articulated by the court below. See 19 F.3d at 460 ("the Board can make a threshold showing of likelihood of success [on the merits] by producing some evidence to support the unfair labor practice charge"; "likelihood of success [on the merits] must be weighed against the possibility of irreparable injury"). Similarly, the standard applied by the First Circuit in *Rivera-Vega* v. *Conagra, Inc.*, *supra*, and *Pye* v. *Sullivan Brothers Printers, Inc.*, 38 F.3d 58 (1994), does not meaningfully differ from the one applied by the court of appeals in this case.[14]

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[14] In *Conagra*, the court stated that, where "the interim relief sought by the NLRB is essentially the final relief sought, the likelihood of success should be *strong*." 70 F.3d at 164 (internal quotation marks omitted). In *Sullivan Brothers Printers*, the court stated that "interim relief in section 10(j) cases is not normally appropriate unless it is clear that ultimate success for the Board will not prove difficult." 38 F.3d at 67 (internal quotation marks omitted). In this case, the Board's decision upholding the allegations of the Regional Director's administrative complaint, on much the same evidentiary record as was before the court of appeals, strongly supports the

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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Associate General Counsel

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National Labor Relations Board

NOVEMBER 1996

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conclusion that her case against petitioner in the Section 10(j) proceeding satisfied the standard articulated by the First Circuit in *Conagra* and *Sullivan Brothers Printers*.

APPENDIX A

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

Case No. 3:94-CV-1037RM

UNITED STATES OF AMERICA, SAUNDRIA BORDONE, REGIONAL DIRECTOR OF THE TWENTY-FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO-VOICE, INCORPORATED, RESPONDENT

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[XX] Decision by Court. This action came before the Court. The decision has been rendered.

IT IS ORDERED AND ADJUDGED the court GRANTS petitioner's motion for voluntary dismissal and DISMISSES the petitioner's action.

This document entered pursuant to Rules 79(A) and 58 of the Federal Rules of Civil Procedure on:

July 23, 1996 Stephen R. Ludwig

By /s/ ANTHONY R. LEE
Deputy Clerk

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
SOUTH BEND DIVISION

Case No. 3:94-CV-1037RM

UNITED STATES OF AMERICA, SAUNDRIA BORDONE, REGIONAL DIRECTOR OF THE TWENTY-FIFTH REGION OF THE NATIONAL LABOR RELATIONS BOARD, FOR AND ON BEHALF OF THE NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

ELECTRO-VOICE, INCORPORATED, RESPONDENT

MEMORANDUM OF STATUS CONFERENCE

A status conference was held in this cause on July 22, 1996. Richard Simon represented the petitioner, and James Stadler represented the respondent. At Mr. Stadler's request, the court attempted to reach Jerry Smetna for the respondent, but Mr. Smetna was not available to take the call.

The court heard arguments on the petitioner's motion for voluntary dismissal. The court finds that final adjudication has occurred before the National Labor Relations Board, and that the petitioner's action under Section 10(j) of the National Labor

Relations Act is therefore moot. On this basis, the court GRANTS the petitioner's motion for voluntary dismissal (filed July 17, 1996 (#72)), and DISMISSES the petitioner's action.

SO ORDERED.

ENTERED: July 22, 1996

/s/ ROBERT L. MILLER, JR.
ROBERT L. MILLER, JR., Judge
United States District Court

cc: Steele/Simon
Barnes/Stadler